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ABSTRACT

This report reviews Federal legal requirements for including students with disabilities in general education classrooms, describes the continuing obstacles to inclusion, and provides guidance for challenging the placement of students with disabilities outside of the general education classroom. Barriers to full inclusion are identified, followed by a discussion of the need for advocates to present the courts with cases that challenge systemic state and local policies and practices that impede inclusion. Key questions for challenging exclusion and the denial of full inclusion of students with disabilities are also listed. A separate section provides the legal basis for inclusion by highlighting legal decisions that recognize the rights of students with disabilities to be educated with children without disabilities. Legal decisions affecting presumption and burden of proof, individualized determination, the right to full educational opportunity, and the duty to provide a continuum of placements are reviewed. Findings in the court case of Oberti v. Board of Education of Clementon, New Jersey, are also presented. A list of objectives and proposed activities designed to achieve full inclusion is provided, along with a list of strategies or remedies to address the key problems of placements that are less than full inclusion. (CR)

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PROMOTING INCLUSION FOR ALL STUDENTS WITH DISABILITIES

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A. *Statement of Issues/Overview*

Despite federal statutory provisions mandating that states provide appropriate education to students with disabilities in classes with their non-disabled peers *"to the maximum extent appropriate"* [20 U.S.C. §1412(5)(B)], children with disabilities, including children in public or private institutions and in other care facilities have been isolated, provided less than meaningful alternatives and denied equal educational opportunities.

Section 1412(5)(B) of the Individuals with Disabilities Education Act expressly requires that students with disabilities shall be educated with children who are not disabled, and that *"special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily,..."*

Regulations implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, also require placement in the regular educational environment unless the school or institution can demonstrate that the education of the individual student with a disability cannot *"with the use of supplementary aids and services be achieved satisfactorily."* 34 C.F.R. §104.34(a).

Furthermore, regulations implementing Title II of the Americans with Disabilities Act require governmental entities such as school districts to administer all programs, services and activities in the most integrated setting appropriate to the needs of individuals with disabilities, and prohibit them from denying qualified individuals with disabilities the opportunity to participate in integrated services, programs and activities even if permissibly separate programs exist. 28 C.F.R. §35.130(b)(2), (d).

Nevertheless, for all too many children and youth with disabilities, little or no consideration is given to their being educated in the regular educational environment with supplementary aids and services. Rather than providing for their individual needs, as, for example, through school-based or community-based mental health services, aides, interpreters, or other supportive services and enabling them to be educated with their non-disabled peers, they are all too frequently removed from the regular educational environment and placed in unnecessarily restrictive settings where they are denied full, equal and appropriate educational services.

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The general ineffectiveness of litigation, federal and state monitoring and enforcement efforts, and other forms of advocacy during the past 15 years underscore the depth and persistence of attitudinal and systemic obstacles to eliminating the barriers that exclude students with disabilities from being educated with their non-disabled peers. Examples of continuing manifestations of this problem are identified below.

B. *Some Barriers to Full Inclusion Experienced by Students with Disabilities*

- Certain states continue to have segregated and dual systems for delivering education to disabled and non-disabled students; some continue to place large numbers of children, in accord with their categorical labels, in state operated institutions; others provide special education at centralized school sites separate from their non-disabled peers; and still others fail to act when statistically significant numbers of students with disabilities are educated in substantially separate classrooms within the public schools.

- Categorization of students by labels, classroom, and curriculum limits their educational outcomes.

- Persons with severe disabilities are disproportionately placed in segregated special education programs, classrooms, and facilities.

- Poor and minority students with disabilities are disproportionately placed in more restrictive programs and settings.

- Students placed in segregated programs, classrooms and facilities do not receive curricula comparable in quality to that provided non-disabled students.

- Failure to provide students with disabilities high quality education in programs with their non-disabled peers to the maximum extent appropriate, reduces graduation rates and, consequently, future employment options.

- Students with disabilities are excluded from participation in state and local assessments without considering individual needs and the full range of options available to accommodate such needs in developing, administering and taking tests - leading to lack of accountability and the expectation that students with disabilities, including severe disabilities, cannot attain the same mastery of skills expected of all other students.

- Separate classes for students with special educational needs are typically not designed to enable students to catch up with their non-disabled peers and/or to return to the regular education classroom.

- Special education classes rarely provide meaningful individualized curriculum; without meaningful individualization they reduce competence, self esteem, and confidence of succeeding in school.

- Full inclusion in the regular education classroom is not linked to inclusion in the community, higher education, housing, transportation, and employment.

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- Role models for students with disabilities are limited because of discrimination in employment as well as a continuing denial of educational opportunities.

- A disproportionate number of youth in secure detention facilities have diagnosed disabilities that were and continue to be inappropriately addressed through education and treatment.

- Participation rates of persons with disabilities in higher education reflects discrimination and effects of prior segregated programs and placements.

- State funding schemes encourage the inappropriate placement of students in restricted placements by compensating schools at a higher per pupil rate for those in substantially separate placements.

- Preschool programs now mandated by IDEA [20 U.S. C. §1419] are being implemented with little or no regard to the LRE requirements of IDEA and Section 504, or the ADA.

- Individual family service plans [IFSPs] developed for infants and toddlers with developmental disabilities who are eligible for early intervention services under Part H of IDEA are not giving adequate consideration to the provision of such services in the "natural environment" with infants and toddlers who do not have developmental disabilities.

- Goals of educational mastery for American students by the year 2000 generally ignore the kinds of supplemental support needed to enable students with disabilities to be educated in the regular educational environment and to succeed.

- Minimal national attention has focussed on the link between national assessment standards and full inclusion for all students with disabilities.

Numerous other examples of discrimination on the basis of disability exist that result in the exclusion of students with disabilities from the educational opportunities available to non-disabled students. Advocates must effectively challenge systemic barriers limiting students' right to full inclusion in regular education classrooms. We must work together to present the courts with cases challenging systemic state and local policies and practices that impede students with disabilities from enjoying their equal rights to participate as full members of the class in the regular educational environment.

We must present the courts with the kind of case that reflects a strategy for challenging attitudinal and societal barriers which have created the expectation that students with disabilities cannot receive meaningful individualized instruction in the regular classroom with their non-disabled peers. We must bring actions which will successfully establish once and for all the presumption that students with disabilities will not be removed or provided educational programming outside of the regular education setting except in the rare instance when even with supplementary aids and services, they cannot be educated in the regular educational classroom.

We must effectively and creatively utilize the legal handles available to us, including the "plain language" argument of section 1412(5)(B) of IDEA, analogous to the Supreme Court's holding

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with respect to §1415(e)(3) in *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 492 (1989); section 504, particularly the mandate under 34 C.F.R. §104.4(b) to provide all students with disabilities comparable aids, benefits, and services [is it really possible to argue that students isolated from their peers on the basis of their disabilities are receiving comparable aids, benefits, and services?]; the provisions under both IDEA and §504 mandating related services necessary to benefit from one's educational program; and the "state of the art" provision recognized in *Timothy W. v. Rochester School District.*, 875 F.2d 954, 973 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 519 ("...educational methods...are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education geared to each child's individual needs"). *See also* 20 U.S.C. §1413(a)(3)(B); 34 C.F.R. §300.385.

It is also critical for advocates to become informed about social science and educational research findings and knowledge available that demonstrate the appropriateness and efficacy of educating most students with disabilities in regular education classrooms. Although the burden is on the school district to rebut the presumption in favor of a student's not being removed from the regular education program [20 U.S.C.§1412(5)(B), the effectiveness of expert testimony by highly qualified experts whose academic lives have been committed to promoting full inclusion of individuals with disabilities has been clearly demonstrated in successful federal actions brought on behalf of individual students in recent years, namely, *Holland v Sacramento City School District*, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd.*, 14 F.3d 1398 (9th Cir. 1994), *Oberti v. Board of Education of Clementon, New Jersey*, 789 F. Supp. 1322 (D.N.J. 1992), *aff'd.*, 995 F.2d 1204 (3rd Cir. 1993), and *Mavis v. Sobol*, 839 F. Supp. 968 (N.D.N.Y. 1994).

C. *Some Key Questions for Challenging Exclusion and the Denial of Full Inclusion of Students with Disabilities*

- Does the LEA consider and explore other alternatives prior to removing a student from the regular education classroom and/or placing the student in a separate special education class (e.g., Title 1, regular education with tutorial assistance, an aide, a behavior support program, assistive technology, etc.)?

  Is there any evidence of differential application based on the nature of a student's classification and/or extent of disability? race/ethnicity/gender/socio-economic class?

- Does the LEA use criteria which are educationally relevant to support its proposed placement outside the regular education classroom and/or educational environment?

- Are placement decisions made by knowledgeable persons, including persons knowledgeable about the student, the meaning of the multidisciplinary evaluation data, and the full range of placement options?

- Are placement decisions removing students from the regular classroom [placing students in separate or substantially separate special education programs] consistent with the goals and objectives of students' IEPS and based on multidisciplinary evaluations?

- Are students with the same classification/label assigned to the same special education classrooms? i.e., are the classrooms identifiable on the basis of disability? on the basis of race/ethnicity or sex? on the basis of disability and sex? i.e., male students classified as having mental retardation?

- Are different special education placements identifiable on the basis of disability? e.g., students with mild mental retardation disproportionately placed in substantially separate special education classes?, students with learning disabilities placed in regular classes with resource rooms as a supplemental service?

- Do individual records reflect that students with similar educational needs are placed in different programs?

- Do students' IEPs comport with the procedural requirements, and include a statement about the extent to which each child in need of special education will be able to participate in regular educational programs?

- Are placement decisions made after the evaluation data is gathered, documented, and considered [34 C.F.R. §300.533(a), and in accordance with identified goals and objectives set forth in the students' IEPs [34 C.F.R. §300.346]?

- Do individual IEPs reflect that each student with disabilities participates with nondisabled students in academic and extracurricular activities to the maximum extent appropriate to that student's needs?

- Do IEPs of individuals having similar educational needs indicate the same/differing degree of inclusion in academic and extracurricular activities? Does degree of inclusion vary within classification by disability or appear to reflect decisions made globally based on students' classifications?

- Is it possible to draw a correlation between students placed in more integrated placements and positive outcomes as measured by successful completion of IEP goals, objectives, social development, independence, social and communicative skills, parental/teacher expectations, positive peer [nondisabled] feedback?

> Is there a correlation or association between heightened quality and content of IEP objectives and degree of integration of students with severe disabilities?

- Is there any evidence in the educational records of students with disabilities that non-regular classroom placements are annually reviewed based on a review of goals and objectives achieved? Does data reflect that changes in placement occur with students returning to regular classrooms because of the efficacy of their special education programs in assisting them to achieve their long term and short term goals and objectives?

- To what degree specifically, do local educational agencies offer a full continuum of educational placements?

- What steps have been taken by state and local agencies to ensure that a full continuum of alternative placements is available to implement IEPs? To what degree have states monitored and required local educational agencies to ensure that new alternative placements are developed as necessary to implement IEPs in accordance with the right of students with disabilities to be integrated to the maximum extent appropriate?

- Does the LEA application for Part B funds indicate efforts to comply with 34 C.F.R. §300.551(a) and §300.552(b)?

- What evidence, if any, exists to indicate that placement teams review the continuum of alternatives in implementing IEPs?

- To what extent do students with disabilities participate in decisions affecting their individualized education program and the placement decision? Is there any relationship between the degree of participation and the degree of integration in the regular education classroom? regular educational setting?

- At the local agency level, to what degree do opportunities exist for students to be integrated with non-disabled students?

- To what degree do students placed in separate special education classes participate in activities offered students in regular education programs, e.g., lunch, class assemblies, physical education, intramural sports, music, band, etc.?

- What evidence exists to demonstrate that decisions concerning integration of students with disabilities are based on individual need as opposed to group expectation/stereotypes?

- Does the state or local school district maintain any comprehensive data on special education programs outcomes, particularly regarding academic gains by students with disabilities? Is any data maintained evidencing the graduation rates and drop out rates for students with disabilities, by disability classification? by percentage of time outside of the regular education classroom? by timely achievement of educational outcomes identified in IEPs? by post secondary school placement or degree of independence and integration in the community, job placement?

- Does the state and/or local school district maintain data attesting to the efficacy or lack of efficacy of so-called "pull-out" programs for students with disabilities?

- How does the special education curriculum compare to the regular education curriculum with respect to degree and level of instruction in higher order cognitive skills, individualized instruction, feedback, etc.?

- What training is available or has been provided teachers [regular and special education] to inform them of their responsibility to comply with the maximum integration requirements? e.g., pre-referral strategies for addressing students' special needs, access to knowledgeable resources, including consulting teachers and other professionals?

- What training or technical assistance is available or has been provided teachers so as to assist them in integrating students with disabilities into their classrooms? e.g., instruction on altering the classroom environment to meet the special needs of a student(s) with disabilities, modifying assignments, adapting instruction and instructional materials, curricula, and methods to better meet the student(s)' needs; using peer tutors, cooperative learning, teachers with specialized training in instructing students with disabilities, aides or other resource personnel, supplemental services, technology assistive devices, and seeking parent involvement?

- What percentage of students with disabilities participate in quality vocational education programs?

- To what degree do state funding formulae create financial incentives for separate placements? Does the variation in statistics between general classroom placements at the state level and the state funding formulas indicate that a financial incentive exists for placing students with disabilities in separate

placements? Has the state traditionally had a dual system for providing services? And do statistics show that students with disabilities in these states are disproportionately placed in more restrictive placements?

-To what degree do funding decisions control/shape categorical labels and [separate] placement decisions? What effect, if any, has the Catastrophic Coverage Act, allowing Medicaid reimbursement of substantial health related services, had on increasing placement of students with disabilities in the regular education program? to participate in employment preparation programs, post secondary education and prepare for independent living?

D. *Maximum Appropriate Integration/Least Restrictive Environment/Full Inclusion - The Legal Bases*

1. Presumption and Burden of Proof

Courts have long recognized the rights of students with disabilities to be educated with their non-disabled peers under the United States Constitution, see, e.g. *Mills v. Board of Education of the District of Columbia*, 343 F.Supp. 866, 880-881 (D.D.C. 1972), under the Individuals with Disabilities Education Act [IDEA], 20 U.S.C.§§1412(5)(B), 34 C.F.R. parts 300.550-556; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794; 34 C.F.R. §104.34(b); and under state law. In *Hairston v. Drosick*, 425 F. Supp. 180 (S.D. W.Va. 1976), an early decision based on the federal statutes, a federal court expressly found:

> "It is an educational fact that the maximum benefits to a child are received by placement in as normal an environment as possible....A child has to interact in a social way with its peers and denial of this opportunity during his minor years imposes added lifetime burdens upon a handicapped individual." *Id.*, at 183-84.

The court further held that any exclusion of a child with disabilities from a regular classroom situation, except as a last resort in situations in which educational needs cannot be met within that classroom, violates both §504 and IDEA.

Section 1412(5)(B) creates a legal presumption in the right of all students with disabilities to be educated to the maximum extent appropriate in the regular education classroom with their non-disabled peers. Significantly, sections 1421(5)(B) and 1414(a)(1)(C)(iv) never use the term "least restrictive environment." Rather, these provisions reflect Congress's statutory preference for educating children with disabilities with nondisabled children. *Greer v. Rome City School District*, 950 F.2d 688 at 695 (11th Cir. 1991), opinion withdrawn and remanded on other grounds, 956 F.2d 1025 (11th Cir. 1992), previous opinion reinstated by rehearing en banc, 967 F.2d 470 (11th Cir. 1992). *See also Oberti*, *supra*, 995 F.2d at 1214 (noting "IDEA's presumption in favor of mainstreaming"); *Holland*, *supra*, 786 F.Supp. at 877-878 (a statutory preference that "rises to the level of a rebuttable presumption").

Participating school districts have an affirmative duty to provide "a continuum of alternate placements...available to meet the needs of" students with disabilities. 34 C.F.R. §300.551(a). The continuum must include instruction in regular class as well as instruction in hospitals and institutions [34 C.F.R. §300.551(b)(1)]; it must also provide for supplementary services, such as resource room, aides, or itinerant instruction to be offered in conjunction with regular class placement. 34 C.F.R.§300.551(b)(2). Moreover, pursuant to 34 C.F.R. §300.552 , "[t]o the maximum extent

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appropriate" students with disabilities must be included in regular classroom settings, as close to home as possible, and unless inconsistent with the student's IEP, in the school the student would attend if s/he did not have a disability. Finally, in choosing the "least restrictive environment", it is essential to consider "any potential harmful effect on the child or on the quality of services which he or she needs." 34 C.F.R.§300.552(d).

Any school district proposing to remove a child from the regular education classroom has the burden of proving that such removal - whether partial or total - is necessary because education in such setting cannot reasonably be accomplished with the use of supplementary aids and services and/or modification of the regular education curriculum. *Oberti*, *supra*, 995 F.2d at 1219; *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 458 (3rd Cir. 1981), *cert. denied*, 458 U.S. 1121; *Davis v. District of Columbia Board of Education*, 530 F.Supp. 1209, 1211-1212 (D.D.C. 1982). In *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989), the Court of Appeals for the Fifth Circuit expressly ruled that IDEA "does not permit states to make mere token gestures to accommodate [students with disabilities in regular education classrooms]; its requirement for modifying and supplementing regular education is broad." Nor can the presumption under IDEA of placement in the regular education classroom be overcome by a mere showing that a special education placement may be academically superior to placement in a regular classroom. Rather, the school must demonstrate that it has considered "whether supplemental aids and services would permit satisfactory education in the regular classroom." *Greer*, 950 F.2d at 696.

While differing somewhat in their precise formulations, the federal courts have recognized five factors as relevant to the determination of whether a placement is consistent with IDEA's presumption in favor of education in the regular education setting:

1. the educational benefits available to a child in a regular classroom supplemented by appropriate aids and services compared to the educational benefits of a special education classroom;

2. the non-academic benefits to the child with a disability of interacting with children without disabilities;

3. the effect of a child with disabilities on the teacher and other students in the classroom;

4. the harm to a child with disabilities of being placed in segregated classes, away from friends, from family, and surrounded by inappropriate role models;

5. the costs of supplementary aids and services necessary to integrate the child with a disability in a regular classroom.

The district court and Third Circuit opinions in *Oberti*, discussed *infra*, include particularly helpful discussions of these factors, as do the district court and Ninth Circuit opinions in *Holland*, the Eleventh Circuit decision in *Greer*, and *Mavis v. Sobol*, 839 F. Supp. 968 (N.D.N.Y. 1994).[1]

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[1] Additional decisions addressing various aspects of the least restrictive environment requirement include, e.g., *Murray v. Montrose County School District*, 51 F.3d 921 (10th Cir. 1995); *Schuldt v. Mankato School District No. 77*, 937 F.2d 1357 (8th Cir. 1991); *Barnett v. Fairfax County School*

Similar to IDEA, the U.S. Department of Education regulations implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.§794, 34 C.F.R. Part 104, requires that persons with disabilities shall be educated with non-disabled persons "to the maximum extent appropriate" and shall be placed in the regular program "unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §104.34(a).

The regulations promulgated under Section 504 more generally state that

> "(1) A recipient...may not...on the basis of handicap:
>
> * * *
>
> (iv) Provide different or separate aid, benefits, or service to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others; *** (3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different."

34 C.F.R. §104.4(b).

The maximum appropriate integration/least restrictive environment requirements also protect children whose needs cannot be met in regular education classes from being placed in overly restrictive and isolated placements. Thus, for example, IDEA and §504 integration requirements would be violated if a child, who could be educated appropriately in a special education classroom within a "regular" education elementary school were, nonetheless, placed in a segregated school for children with disabilities. *See, e.g., Roncker v. Walter*, 700 F.2d 1058 (6th Cir 1983), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196.

2. Individualized Determination

Once a child is found to be eligible for special education and/or related services on the basis of an unbiased, multidisciplinary evaluation process, a written individualized education program (IEP)

Board, 927 146 (4th Cir. 1991); *Lachman v. Illinois Board of Education*, 852 F.2d 290 (7th Cir. 1988); *A.W. v. Northwest R-1 School District*, 813 F.2d 158 (9th Cir. 1987); *Hawaii State Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1982); *Tokarcik v. Forest Hills School District*, 665 F.2d 443 (3rd Cir.), *cert. denied*, 458 U.S. 1121 (1981); *Bonadonna v. Cooperman*, 619 F.Supp. 401 (D.N.J. 1985); *Davis v. District of Columbia Board of Education*, 503 F.Supp. 1209 (D.D.C. 1982); *Springdale School District v. Grace*, 494 F.Supp. 266 (W.D. Ark. 1980), *aff'd.* 656 F.2d 800 (8th Cir. 1981), *vacated and remanded for further consideration*, 458 U.S. 1118 (1982), *aff'd.*, 693 F.2d 41, *cert. denied*, 461 U.S. 927 (1983).

designed to meet his/her educational needs must be developed. 20 U.S.C. §1401(20), 1414(a)(5); 34 C.F.R. §300.343. The IEP must include, *inter alia*, a statement of annual goals, short-term instructional objectives, reevaluation criteria, and "a statement of the specific educational services to be provided to such child, and the extent to which the child will be able to participate in the regular education program,..." 20 U.S.C. §1401(20)(C)(emphasis added).

In *Daniel R.R. v. El Paso Independent School District*, 874 F.2d 1036, 1048 (5th Cir. 1989), the appellate court stated that the analysis under §1412(5)(B) is "an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the school's response to the child's needs."

The trial court in *Holland*, *supra*, emphasized that "the decision as to whether any particular child should be educated in a regular classroom setting...is necessarily an inquiry into the needs and abilities of one child, and does not extend to a group or category of handicapped children...." *Id.*, 786 F. Supp. at 878. Moreover, the court recognized that consistent with 20 U.S.C.§1412(5)(B), the school district making an individualized determination, "*must demonstrate that it has considered* 'whether supplemental aids and services would permit satisfactory education in the regular classroom.'" *Holland*, 786 F.Supp. at 879 , quoting *Greer v. Rome City School District*, 950 F.2d at 696 (emphasis added).

In *Greer*, the Court of Appeals for the Eleventh Circuit issued a strong and well reasoned opinion affirming a lower court decision which ordered the school district to place a nine year old child in the school's regular kindergarten, instead of a separate special education classroom. The court expressly stated that "before the school district may conclude that a [child with disabilities] should be educated outside the regular classroom, it must consider...the whole range of supplemental aids and services...for which it is obligated under [IDEA] and the regulations promulgated thereunder to make provision." *Id.*, 950 F.2d at 696. Moreover, the appellate court recognized, only when the child's education cannot be achieved satisfactorily in the regular education class room with one or more of such supplementary aids and services may s/he be placed in another setting, and consideration of these issues must occur "prior to and during the development of the IEP." *Id.*

3. Right to Full Educational Opportunity

Under IDEA and Section 504, the right of a student with disabilities to receive a free appropriate public education in the regular educational setting to the maximum extent appropriate to one's needs applies to the full range of academic program options (such as art, music, industrial arts, consumer and homemaking education, and vocational education), nonacademic services, physical education, and extracurricular activities. 34 C.F.R. §§300.303-307; 34 C.F.R. §104.4(b), 34 C.F.R. §§104.34(c) and 104.37.

IDEA and its regulations require state and local implementation of plans to provide full educational opportunity to all children with disabilities aged birth through twenty-one. See 20 U.S.C. §1412(2)(A); §1414(a)(1)(C); 34 C.F.R. §300.123, §300.222, §300.304.

Section 504, by the terms of the statute, forbids discrimination against individuals on the basis of disability; the regulations include the following among the types of discrimination which are prohibited:

"(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap: (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; *** (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. *** (4) A recipient may not...utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped person, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State. (5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits form Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons." 34 C.F.R. §104.4(b).

The regulations implementing Title II of the Americans with Disabilities Act contain parallel provisions. See 28 C.F.R. §35.130(b). In addition, the ADA regulations explicitly require public entities (such as school systems) to "make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless...making the modifications would fundamentally alter the nature of the service, program or activity," 28 C.F.R. §35.130(b)(7), and prohibits them from imposing any eligibility criteria "that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered." 28 C.F.R. §35.130(b)(8),

The significance of non-academic benefits that a child with disabilities may receive from exposure to students without disabilities cannot be separated from academic benefits, as a child may be able to learn more easily as the result of improved self esteem and motivation from being placed with non-disabled students or learn by modelling, e.g., language and behavior.

4. Duty to Provide a Continuum of Placements

Regulations implementing 20 U.S.C. §1412(5)(B) require state and local school districts to provide a continuum of alternative placements to meet the special educational needs of students with disabilities. 34 C.F.R. §300.551(a). The continuum must include instruction in regular classrooms, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. §300.551(b). Furthermore, the continuum must make provision for supplementary aids and services that will enable students with disabilities to remain in the regular classroom and regular educational setting. 34 C.F.R. §300.551(b)(2). While each public agency must insure that the continuum is available to the extent necessary to implement each student's IEP, the establishment of

this continuum is the responsibility of the state education agency. 20 U.S.C. §1412(6); 34 C.F.R. §300.550(a). *Eva N. v. Brock*, 741 F. Supp. 626, 637 (E.D.Ky. 1990), *aff'd without opin.*, 943 F.2d 51 (6th Cir. 1991).

The federal court in *Holland* provided a strong interpretation of the continuum requirement. Therein the court recognized that IDEA requires each school district to establish a continuum of educational placements, beginning with mainstreaming/fully integrated program as the "starting point and presumption". *Id.*, 786 F.Supp. at 882 n.9. "A placement in other than a regular class is a fall-back choice made only *after* it is determined that placement in regular classes [with supplementary aids and services] will be unsuccessful." *Id.*

In *Cordero v. Pennsylvania Department of Education*, 795 F. Supp. 1352 (M.D.Pa. 1992), the court granted summary judgment on behalf of a class of children with disabilities whom the local school districts were unable to educate, yet failed to provide appropriate private placements because of the lack of state approved private schools and of alternative publicly operated programs and services. Plaintiffs argued, *inter alia*, that the state's over-emphasis on private school placements and under emphasis on public programs and facilities constituted an inadequate continuum of services, resulting in over-restrictive placements, i.e., unnecessary private placements or completely inappropriate placements, i.e., homebound or a mainstream classroom. Because alternatives did not exist, plaintiffs argued that some school districts place students in private residential facilities when they could be educated in the public school setting with proper support services. In granting injunctive relief against the state defendants for failure to comply with IDEA, the court blamed the design of the state system, the absence of adequate procedures for identifying geographic areas within the state lacking an adequate continuum of placement options, a failure to develop additional necessary publicly operated classes, lack of leadership and adequate state education agency supervision. 795 F. Supp. at 1362-64. The court order required the state to enlarge the continuum of placement options in those area found inadequate, taking care to ensure that children, regardless of the severity of their needs, are placed in the least restrictive environment.

5. Moving Toward Full Inclusion: Oberti as a Model

In *Oberti v. Board of Education of Clementon, New Jersey*, 801 F. Supp. 1392 (D.N.J. 1992), *aff'd.*, 995 F.2d 1204 (3rd Cir. 1993), a federal court ordered the local public school district to develop an "inclusive education plan" for an eight year old student with severe cognitive and communications disabilities. The school district had refused to educate the child in the regular education classroom, arguing that his level of intellectual functioning, based on standardized intelligence tests, precluded him from participating in the class and his behavior would be disruptive in the neighborhood school. The school contended that the nature and severity of the child's disabilities required his being educated in a self-contained classroom for students with multiple disabilities, which in this case, was located outside of the school district. The school district's consideration of less restrictive alternatives was perfunctory and based on its belief that inclusion is only appropriate for children whose cognitive disabilities are substantially less severe than this child's level of functioning.

The trial court made a number of significant findings in finding that the school defendants had violated the child's rights under IDEA and §504. Although the court recognized that a relationship appears to exist between classification changes (i.e., "preschool handicapped", "educable mentally

retarded", and "multiply handicapped") and placement in special education classes which are designated for children with particular classifications, it noted that "we do not find [the classifications] either meaningful or relevant to the issues before us." 801 F. Supp. at 1395, n.2. Acknowledging that this child's behavior was difficult to manage at times, the court determined that it was not a threat or danger to other people, nor so disruptive to impair the education of other children, *id.* at 1395; his behavior problems were exacerbated by the district's failure to provide him with adequate supplementary aids and services and an appropriate IEP containing, *inter alia*, a behavior management program. *Id.* at 1398. In addition, the court specifically found that "[t]here are professionally recognized methods and techniques by which educational experiences in regular classrooms can be modified so students like Rafael can benefit from participating in them, without interfering with the education of nondisabled students..." *Id.* The court expressly referred to using special and regular education teams, consultants, and itinerant teachers as a means of effectively educating students with severe cognitive disabilities in regular education settings, and using parallel instruction as one of a variety of inclusive techniques. *Id.*

Moreover, drawing heavily from testimony by recognized experts in the field, the court explicitly found that "Rafael and children like him *may be harmed* by being placed in segregated classes, away from friends and family, and surrounded by inappropriate role models." *Id.* (emphasis added). Indeed, the court stated "[s]ucess in special schools and special classes is unlikely to lead to Rafael functioning successfully either in integrated education settings or in the community." *Id.* at 1399. Rather, the court found on the basis of expert testimony that "all children with disabilities need access to integrated experiences where they can learn to function effectively...[and]...nondisabled people need to learn to function with disabled people through such experiences." *Id.* Because "[i]nclusive public education for children with disabilities offers substantial benefits for children with disabilities, for their nondisabled peers as well as for the community at large....," the court acknowledged that it increases "the opportunities for individuals with disabilities to become fully-functioning, co-equal members of society." *Id.*

The *Oberti* court defined "supportive inclusive education" as "[w]hen a child with a disability is placed as a full member of a regular class with the provision of supplementary aids and services...." *Id.* at 1400. Distinguishing the concept of total "mainstreaming", the court determined that an "inclusive education program...does not imply that all special service delivery must occur within the regular class", but may be delivered on a pull-out basis, within the regular class, or a combination of the two, depending upon the needs of the child and the class as determined by the teachers and the team involved." *Id.* at 1400. The court ruled that a school's obligation to educate a student to the maximum extent appropriate in the regular classroom setting as close to home as possible is met when the student with a disability has become a full member of a regular class or is included or mainstreamed in the regular class to the maximum extent appropriate. *Id.* at 1400-1401. Consequently, the court found that "*before* exploring other, more restrictive, alternatives" schools "must consider placing children with disabilities in regular classroom settings, with the use of supplementary aids and services, including classroom assistants..." *Id.* at 1401, citing *Greer*, 950 F.2d at 696, and *Daniel R.R.*, 874 F.2d at 1048.

Relying on the district court decision in *Holland*, *supra*, the court ruled that the preference for or presumption in favor of inclusion will not be successfully rebutted without a clear showing that the child's needs are so severe that he will not benefit from inclusion; that his/her behavior is "so disruptive as to significantly impair the education of other children" in the class; or the cost of

providing an inclusive education "will significantly affect other children in the district." *Oberti*, 801 F. Supp. at 1402, citing *Holland*, 786 F. Supp. at 874.

In the case at hand, the *Oberti* court ruled that the school district's proposed self-contained, out of district classroom which provided no opportunities for integration with nondisabled students violated IDEA; as did the district's failure to provide Rafael supplementary supports, an appropriate curriculum and a behavior management plan during the period in which he was placed in the regular education [the developmental kindergarten] classroom. 801 F. Supp. at 1402. Moreover, the court determined that the school's failure to provide Rafael with an appropriate education with supplementary aids and services contributed to his behavioral difficulties, and resulted in his unjustifiable exclusion. *Id.* at 1403.

The trial court further held that the school district failed to demonstrate that curriculum modifications needed to meet Rafael's needs justified his exclusion, or that necessary modifications within a regular classroom would be too costly or would significantly interfere with the education of other students. *Id.* Moreover, based on testimony by experts in the area of integration, the court rejected the school district's argument that Rafael was too disruptive or too disabled intellectually to benefit from an inclusive placement. *Id.* at 1403-1404. To the contrary, the court ruled that with an appropriate level of supplementary aids and services, he was likely to benefit from an inclusive placement as were the nondisabled students from his placement. *Id.* at 1404. Emphasizing that students with disabilities do not have to earn their way into an integrated school setting by first proving they can function successfully in a segregated setting, the court ruled that under IDEA, "[i]nclusion is a right, not a privilege for a select few." *Id.* at 1404. In reaching this holding, the court took judicial notice of the potential for harm when a child with a disability is educated in a segregated milieu. *Id.*, citing 34 C.F.R. §300.552(d).

Significantly, the *Oberti* court also found that the school district violated section 504 by denying him the opportunity to participate in the regular educational program solely on the basis of his disability and by failing to investigate and consider modifications necessary to accommodate Rafael and enable him to benefit from an inclusive education program in his local school district. *Id.* at 1405-1407.

On appeal, the Third Circuit affirmed the district court's order that the school system design a more inclusive education plan in accordance with IDEA. 995 F.2d at 1224. The Third Circuit relied heavily upon the plaintiffs' expert testimony in upholding the lower court's conclusion that the school district had violated IDEA. *See, e.g.*, 995 F. Supp. at 1222.[2]

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[2] The Third Circuit declined to reach the issue of whether the school district's conduct had violated §504 as well. 995 F.2d at 1223, n.29.

E. *Objectives and Proposed Activities Designed to Achieve Full Inclusion* [and for challenging systemic barriers impeding students with disabilities from being educated to the maximum extent with non-disabled students in the regular education classroom]:

- identify those discriminatory policies at state and local levels that prevent individuals with disabilities in preschool, elementary, secondary and post secondary institutions from achieving full inclusion;

- identify those practices at the state and local agency levels which impede individuals with disabilities from being fully integrated in preschool, elementary, secondary, and post secondary institutions;

- identify the kind of facts needed to challenge specific policies at the state and local levels which are impeding full inclusion of students;

- identify the kind of facts necessary to challenge successfully discriminatory state and local practices resulting in the denial of full inclusion of students with disabilities;

- prioritize the tasks necessary to achieve the goal of promoting inclusion;

- identify those systemic policies and practices at the state and local levels which are most conducive to successful legal challenge under the different legal theories;

- identify and explore available, and perhaps, new legal theories, their interrelationship, and, depending on the nature of the claim and the defendants, consider rationales for pursuing claims under different legal theories, including, IDEA, §504, ADA, the Fourteenth Amendment, the education and equal protection clauses of specific state constitutions, and state civil rights statutes;

- identify and gain a thorough understanding of the nature and scope of the issue/problem, including by collecting and analyzing a variety of information from a wide spectrum of sources to obtain a complete and thorough understanding of the issue and the context in which it exists or arises;

- research and draw upon information, knowledge, and understanding, and experiences which others may have gained in addressing similar or related problems in similar settings;

- identify and seek access to a wide variety of valued expertise of different types as needed;

- determine whether there is any interest in collaborating with state and local educational officials, teachers, parents and students, including students with disabilities to develop a unitary system for all students which is prepared to provide such supportive services as necessary to enable all students to reach specified educational outcomes;

- consider other alternatives for restructuring public education to ensure attainment of expected educational outcomes by all students, including those with moderate to severe disabilities through the provision of supportive services.

F. Strategies or Remedies to Address the Key Problems of Less Than Full Inclusion

To address the recurrent and widespread problem of discrimination on the basis of disability and, specifically, to promote inclusion, and, thereby increase the number of students with disabilities, including severe disabilities, who are appropriately educated in regular educational classrooms, it is essential to do the following:

Conduct brainstorming sessions with advocates, student-clients with disabilities, educators and informed research personnel, to discuss and understand the range of different issues and the nature and scope of the problem, and develop a process for prioritizing those issues most in need of being redressed;

For purposes of targeting limited resources, identify the kind of national and statewide data that ought to be gathered from the U.S. Department of Education, Office of Special Education Programs, including breakdown of data gathered by OSEP for Annual Report to Congress, state plans, local applications for funding under Parts B and H of IDEA, state monitoring reports, surveys conducted by the Office for Civil Rights showing breakdowns by race, gender and disability, copies of administrative complaints filed with OCR and/or the state educational agency;

Identify other advocates, community and national organizations, parent groups and educators who are committed to addressing issues of discrimination on the basis of disability, specifically the exclusion of children and students to full membership in the regular classroom in preschool, elementary and secondary, post-secondary education programs and in institutions of higher education;

Brainstorm with a working group of knowledgeable advocates to develop a detailed plan identifying a variety of strategies, including litigation and non-litigation strategies, for implementing the right of all students with disabilities to be educated to the maximum extent appropriate with their non-disabled peers;

Prepare specific facts associated with state and institutional policies and practices that are conducive to successful systemic challenges under different legal theories on behalf of persons with disabilities who are being denied full inclusion;

Identify specific pre-referral interventions to modify instruction, classroom management, and instructional approach with specific children who might be difficult to teach or at risk of being referred for evaluation, testing and possible special education placement, by identifying research, studies, and models in which, for example, the inattention or disruptive behavior of difficult to teach children and youth is effectively addressed and their other needs accommodated through assistance provided by trained teachers, aides and school based consultants;

Identify specific strategies and accommodations that will enable children and youth with disabilities to be educated in the regular educational classroom, e.g., establishing

school based health clinics for assisting, in part, students with disabilities having emotional and/or behavioral manifestations; to integrate to the degree possible necessary related services objectives of IEP into all aspects of regular curriculum and school routing, minimizing pull-out programs and stigma; use of qualified aides to assist children and youth; use of peer-tutoring, adult tutoring, cooperative learning; use of heterogenous grouping strategies at school site; compensatory education provided by Title 1 and special education certified teachers in accordance with IEPs in the regular classroom, not through conventional resource pull-out program offered in separate classroom; providing training and technical assistance to teachers to enable them to understand the educational implications of individual differences so they might provide effective learning to all students in integrated programs; and encouraging parental participation and involvement;

Identify model programs which assume that all children and students are entitled to be educated with their non-disabled peers to the maximum extent: early intervention programs that provide services to infants and toddlers in the most natural environment; preschool programs for 3 to 5 year old children with disabilities who are placed in public or private daycare, early education programs with non-disabled children of comparable chronological age; regular education classroom programs; vocational education programs; and higher education institutions [public and private];

Incorporate in the development of other national and state policies, e.g., concerning the restructuring schools, setting national assessment and testing goals and standards, procedures that are consistent with moving from a separate to an inclusive system in which all children are educated together.

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